

## FWS, Interior/NOAA, Commerce

## § 402.45

in this subpart or subpart B of this part in any reinitiated consultation.

(b) *Exchanges of scientific information.* As part of any of the additional consultation procedures provided in this subpart, EPA and the Services shall establish mutually-agreeable procedures for regular and timely exchanges of scientific information to achieve accurate and informed decision-making under this subpart and to ensure that the FIFRA process considers the best scientific and commercial data available on listed species and critical habitat in a manner consistent with the requirements of FIFRA and ESA.

### § 402.43 Interagency exchanges of information.

EPA may convey to the Service a written request for a list of any listed species or critical habitat that may be present in any area that may be affected by a FIFRA action. Within 30 days of receipt of such a request the Service shall advise EPA in writing whether, based on the best scientific and commercial data available, any listed species or critical habitat may be present in any such area. EPA may thereafter request the Service to provide available information (or references thereto) describing the applicable environmental baseline for each species or habitat that EPA determines may be affected by a FIFRA action, and the Service shall provide such information within 30 days of the request.

### § 402.44 Advance coordination for FIFRA actions.

(a) *Advance coordination.* EPA may request the Service to designate a Service Representative to work with EPA in the development of an effects determination for one or more listed species or critical habitat. EPA shall make such a request in writing and shall provide sufficient detail as to a FIFRA action planned for consultation to enable the Service to designate a representative with appropriate training and experience who shall normally be available to complete advance coordination with EPA within 60 days of the date of designation. Within 14 days of receiving such a request, the Service

shall advise EPA of the designated Service Representative.

(b) *Participation of Service Representative in preparation of effects determination.* The Service Representative designated under paragraph (a) of this section shall participate with EPA staff in the preparation of the effects determination identified under paragraph (a) of this section. EPA shall use its best efforts to include the designated Service Representative in all relevant discussions on the effects determination, to provide the designated Service Representative with access to all documentation used to prepare the effects determination, and to provide the designated Service Representative office and staff support sufficient to allow the Service Representative to participate meaningfully in the preparation of the effects determination. EPA shall consider all information timely identified by the designated Service Representative during the preparation of the effects determination.

### § 402.45 Alternative consultation on FIFRA actions that are not likely to adversely affect listed species or critical habitat.

(a) *Consultation obligations for FIFRA actions that are not likely to adversely affect listed species or critical habitat when alternative consultation agreement is in effect.* If EPA and the Service have entered into an alternative consultation agreement as provided below, EPA may make a determination that a FIFRA action is not likely to adversely affect a listed species or critical habitat without informal consultation or written concurrence from the Director, and upon making such a determination for a listed species or critical habitat, EPA need not initiate any additional consultation on that FIFRA action as to that listed species or critical habitat. As part of any subsequent request for formal consultation on that FIFRA action under this subpart or subpart B of this part, EPA shall include a list of all listed species and critical habitat for which EPA has concluded consultation under this section.

(b) *Procedures for adopting and implementing an alternative consultation agreement.* EPA and the Service may enter into an alternative consultation

agreement using the following procedures:

(1) *Initiation.* EPA submits a written notification to the Service Director of its intent to enter into an alternative consultation agreement.

(2) *Required contents of the alternative consultation agreement.* The alternative consultation agreement will, at a minimum, include the following components:

(i) *Adequacy of EPA Determinations under the ESA.* The alternative consultation agreement shall describe actions that EPA and the Service have taken to ensure that EPA's determinations regarding the effects of its actions on listed species or critical habitat are consistent with the ESA and applicable implementing regulations.

(ii) *Training.* The alternative consultation agreement shall describe actions that EPA and the Service intend to take to ensure that EPA and Service personnel are adequately trained to carry out their respective roles under the alternative consultation agreement. The alternative consultation agreement shall provide that all effects determinations made by EPA under this subpart have been reviewed and concurred on by an EPA staff member who holds a current certification as having received appropriate training under the alternative consultation agreement.

(iii) *Incorporation of new information.* The alternative consultation agreement shall describe processes that EPA and the Service intend to use to ensure that new information relevant to EPA's effects determinations is timely and appropriately considered.

(iv) *Incorporation of scientific advances.* The alternative consultation agreement shall describe processes that EPA and the Service intend to use to ensure that the ecological risk assessment methodologies supporting EPA's effects determinations incorporate relevant scientific advances.

(v) *Oversight.* The alternative consultation agreement shall describe the program and associated record keeping procedures that the Service and EPA intend to use to evaluate EPA's processes for making effects determinations consistent with these regulations and the alternative consultation agree-

ment. The alternative consultation agreement shall provide that the Service's oversight will be based on periodic evaluation of EPA's program for making effects determinations under this subpart. Periodic program evaluation will occur at the end of the first year following signature of the alternative consultation agreement and should normally occur at least every five years thereafter.

(vi) *Records.* The alternative consultation agreement shall include a provision for EPA to maintain a list of FIFRA actions for which EPA has made determinations under this section and to provide the list to the Service on request. EPA will also maintain the necessary records to allow the Service to complete program evaluations.

(vii) *Review of Alternative Consultation Agreement.* The alternative consultation agreement shall include provisions for regular review and, as appropriate, modification of the agreement by EPA and the Service, and for departure from its terms in a particular case to the extent deemed necessary by both EPA and the Service.

(3) *Training.* After EPA and the Service enter into the alternative consultation agreement, EPA and the Service will implement the training program outlined in the alternative consultation agreement to the mutual satisfaction of EPA and the Service.

(4) *Public availability.* The alternative consultation agreement and any related oversight or monitoring reports shall be made available to the public to the extent provided by law.

(c) *Oversight of alternative consultation agreement implementation.* Through the program evaluations set forth in the alternative consultation agreement, the Service will determine whether the implementation of this section by EPA is consistent with the best scientific and commercial information available, the ESA, and applicable implementing regulations. The Service Director may use the results of the program evaluations described in the alternative consultation agreement to recommend changes to EPA's implementation of

the alternative consultation agreement. The Service Director retains discretion to terminate or suspend the alternative consultation agreement if, in using the procedures in this subpart, EPA fails to comply with the requirements of this subpart, section 7 of the ESA, or the terms of the alternative consultation agreement. Termination, suspension, or modification of an alternative consultation agreement does not affect the validity of any NLAA determinations made previously under the authority of this subpart.

**§ 402.46 Optional formal consultation procedure for FIFRA actions.**

(a) *Initiation of consultation.* EPA may initiate consultation on a FIFRA action under this section by delivering to the Service a written request for consultation. The written request shall be accompanied by an effects determination as defined in § 402.40(b) and a list or summary of all references and data relied upon in the determination. All such references and data shall be made available to the Service on request and shall constitute part of the Service's administrative record for the consultation. The time for conclusion of the consultation under section 7(b)(1) of the Act is calculated from the date the Service receives the written request from EPA. Any subsequent interchanges regarding EPA's submission, including interchanges about the completeness of the effects determination, shall occur during consultation and do not extend the time for conclusion of the consultation unless EPA withdraws the request for consultation.

(b) *Additional information determination.* For an effects determination prepared without advance coordination under § 402.44, the Service may determine that additional available information would provide a better information base for the effects determination, in which case the Service Director shall notify the EPA Administrator within 45 days of the date the Service receives the effects determination. The notification shall describe such additional information in detail, and shall identify a means for obtaining that information within the time period available for consultation. EPA shall provide a copy of the Service Director's

notification to any applicant. EPA may thereafter revise its effects determination, and may resubmit the revised effects determination to the Service. If EPA advises the Service it will not resubmit a revised effects determination to the Service, its initiation of consultation on the effects determination is deemed withdrawn.

(c) *Service responsibilities.* (1) Within the later of 90 days of the date the Service receives EPA's written request for consultation or 45 days of the date the Service receives an effects determination resubmitted under paragraph (b) of this section, and consistent with section 7(b)(1) of the Act, the Service shall take one of the following actions:

(i) If the Service finds that the effects determination contains the information required by § 402.40(b) and satisfies the requirements of section 7(b)(4) of the Act, and the Service concludes that the FIFRA action that is the subject of the consultation complies with section 7(a)(2) of the Act, the Service will issue a written statement adopting the effects determination; or

(ii) The Service will provide EPA a draft of a written statement modifying the effects determination, which shall meet the requirements of § 402.14(i), and as modified adopting the effects determination, and shall provide a detailed explanation of the scientific and commercial data and rationale supporting any modification it makes; or

(iii) The Service will provide EPA a draft of a biological opinion finding that the FIFRA action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, and describing any reasonable and prudent alternatives if available.

(2) If the Service acts under paragraphs (c)(1)(ii) or (c)(1)(iii) of this section, EPA shall, on request from an applicant, provide the applicant a copy of the draft written statement or draft biological opinion received from the Service. The Service shall at the request of EPA or an applicant discuss with EPA and the applicant the Service's review and evaluation under this section, and the basis for its findings. EPA and any applicant may submit written comments to the Service within 30 days after EPA receives the draft